NGOOI KU SIONG & ANOR.

v.

AIDI ABDULLAH

FEDERAL COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
GEORGE SEAH FJ
SYED AGIL BARAKBAH FJ
[CIVIL APPEAL NO. 234 OF 1983]
11 JUNE 1984

DAMAGES: *Quantum - Whether excessive - Loss of future earnings and loss of earning capacity - Whether items of special damages - Whether recoverable.*

The appeal was in respect of the quantum of damages in a motor accident claim in which a sum of RM81,000 was awarded by the High Court, Kuala Lumpur, as general damages for pain and suffering and loss of amenities. The appellants admitted liability for negligence but alleged that the award was manifestly excessive and not in keeping with the trend of authorities. The respondent cross-appealed against the refusal of the Judge to award him damages for loss of future earnings and/or loss of earning capacity.

Held:

A. Appeal

[1] The trial Judge had not applied the correct principle in assessing damages for facial injuries separately. The fractures and other connected injuries should be assessed together and then just added up at the end because they are not separate heads of compensation.

[2] However, the award of RM26,000 under the item "Facial Injuries" was in no way manifestly excessive or unreasonable.

[3] The assessment in respect of the third and fourth items of injuries was also just and reasonable.

[4] The award of RM40,000 for the fracture of the voice box was however erroneous and manifestly excessive. The fact that the respondent's chances of getting employment in the future have been affected by the impairment of his voice fell under the items of loss of future earnings and/or loss of earning capacity and should have been considered separately from pain and suffering and loss of amenities. Further, it was not proper for the Judge to have discarded the authorities. Experience alone, however long, without resort to comparable cases which are the best guides, may result in speculation.

[5] In the circumstances, a sum of RM22,000 would be a fair and reasonable award.

B. Cross-appeal

[1] The trial Judge erred in holding that loss of future earnings and loss of earning capacity are items of special damages which the respondent was entitled to claim only if they were specifically pleaded. Both items fall under general damages. It was therefore sufficient for the respondent to aver, as he had done, in general terms in the pleadings.

[2] The respondent, however, was not entitled to recover damages for loss of future earnings. For the loss of future earnings there must be evidence of a real and substantial loss, which must be remote and speculative.

[3] Neither was he entitled to recover damages for loss of earning capacity. The claim for loss of earning capacity is generally available when the plaintiff is in employment at the time of the trial. Though the respondent was not in employment at the time of the trial, there was no substantial risk that he would not get employment again in the future.

[4] The claim for loss of earnings under special damages pleaded as at RM400 per month for 17 months must be dismissed. The respondent had himself to blame for not making any attempt to seek another employment or to return to his former employment much earlier.

[Appeal allowed. Cross-appeal dismissed.]

Cases referred to:
Lim Eng Kay v. Jaafar bin Mohd. Said [1982] CLJ (Rep) 190
Rasidin bin Partorjo v. Federick Kiai [1976] 2 MLJ 214
Mad bin Mohamad Said & Anor. v. Perianayagam & Anor. [1972] 1 MLJ 67
Low Ah Tow v. Yusof Kayab [1954] 20 MLJ 112
Domsalla v. Barr [1969] WLR 630
Phillips v. Phillips [1878] QBD 127
Ong Ah Long v. Dr. S. Underwood [1983] CLJ (Rep) 300
Moeliker v. A. Reyrolle & Co. Ltd [1977] 1 All ER 9
Cook v. Consolidated Fisheries Ltd. [1977] ICR 635

Other sources referred to:
Quantum in Accident Cases, K.S. Dass Vol. 2, pp. 87-89, 319, 322, 432
Quantum of Damages, 4th Edn., Kemp & Kemp Vol. 1, pp. 122 & 123

For the appellants - Guy Verughese
For the respondent - Kulasegeran (Y.L. Tho with him)

JUDGMENT

Syed Agil Barakbah FJ:

This appeal relates to the quantum of damages in a motor accident claim in which a sum of RM81,000 was awarded by the learned Judge of the High Court, Kuala Lumpur as general damages for pain and suffering and loss of amenities. The appellants allege that the award is manifestly excessive and not in keeping with the trend of authorities. The respondent cross-appealed against the refusal of the learned Judge to award him damages for loss of future earnings and/or loss of earning capacity. There is no appeal on liability for negligence which was admitted by the appellants in the Court below.

The Brief Facts

The accident occurred on 30 July 1977 at about 7.50 a.m. The respondent was riding motor cycle BAK 8248 along Jalan Gasing, Petaling Jaya, Selangor when he was knocked down by motor lorry BAV 950 driven by the first appellant as the servant or agent of the second appellant, after the lorry had emerged from a minor road. As a result the respondent received serious injuries and was admitted to the University Hospital, Kuala Lumpur where he received medical treatment for a period exceeding three months.

Injuries

The respondent sustained injuries as shown in the medical specialist's report on pp. 47 - 50 of appeal record. The learned Judge itemised them in four groups:

(1) facial injuries which include extensive bruises and swelling over right half of his face, 3 fractures and loss of nine teeth. For the 3 fractures, the plaintiff was wired and mobilised with arch bars between his upper and lower jaws and they were removed before his discharge from hospital on 5 November 1977.

(2) neck injuries which include lacerations to the laryngeal region, two fractures to the thyroid cartilage and cricoid ring which prevented the plaintiff from speaking or vocalizing for 3 months following the accident. An emergency trachostomy was done to him upon admission and a laryngeal stent was inserted and which was only removed on 19 October 1977. However, the plaintiff's voice has never been quite the same and it is still hoarse and weak.

(3) compound fracture of the lower half of the left radius and ulna which required fixation of a pin and plate and which were subsequently removed when the fracture showed union.

(4) minor bruises on both knees and right chin which have healed.

For the above injuries, the plaintiff was hospitalised for 3 months and 5 days. He under-went 4 operations and had been under constant medical attention for well over 3 years.

General Damages - Facial Injuries

In assessing damages under this head the learned Judge classified the injuries under four separate items. The first item relates to facial injuries which include three fractures, loss of nine teeth apart from extensive bruises and swelling over the right half of the face, as described earlier. The learned Judge made separate awards for the fractures and the other injuries under this item for which she arrived at the sum of RM31,500 but deducted RM5,500 for overlapping and awarded RM26,000 as damages.

In examining this award we confined ourselves to the question whether the Judge had applied the correct principle or whether the assessment of damages was perverse (per Salleh Abas FJ as he then was in *Lim Eng Kay v. Jaafar bin Mohd. Said* [1982] CLJ (Rep) 190 and *Rasidin bin Partorjo v. Federick Kiai* [1976] 2 MLJ 214). We are of the opinion that the fractures and the other connected injuries should be assessed together and not separately and then just added up at the end because they are not separate heads of compensation. (*Mad bin Mohamad Said & Anor. v. Perianayagam & Anor.* [1972] 1 MLJ 67 at p. 68. The learned Judge, however, gave allowance for overlapping. Although the principle applied was incorrect, we are of the view that the award of RM26,000 under this head is in no way manifestly excessive or unreasonable. We have in mind three comparable cases in which the injuries were quite similar but less extensive than the present. In *Lee Yoke Lan (f) v. Lee Cheng Hor & Anor.* (*Quantum in Accident Cases*, Vol. 2 by K. S. Dass on pp. 319 to 322),a sum of RM20,000 was awarded to the first plaintiff a 46 year old spinster as general damages for fractures of the left clavicle of the right femur and of the mandible with associated injuries. That was in 1975. In *Othman bin Pakir Mohamed & Anor. v. Yusuf bin Ahmad & Anor*. (Dass' Vol. 2 *(supra)* on p. 88 & 89), RM15,000 was awarded to the second plaintiff a 33 year old housewife for the fracture of the upper and lower jaws, loss of three upper teeth and multiple bruises over the neck and chin regions. That was in 1978. The third is a 1978 Singapore case of *Kam Kok Beng v. Chan Siew Kuan* (Dass' 2nd Vol. pp. 87 - 88), involving *inter alia* multiple facial lacerations, compound fracture of ethmoid and frontal sinuses, compound fracture of the nasal bone and fracture of zygomatico maxillary complex to a 24 year old bachelor plaintiff. A sum of RM45,000 was awarded for the above including facial disfigurement. In the present case the respondent was a 25 year old bachelor at the time of the proceeding and suffered extensive injuries apart from having to undergo four separate operations and was under medical attention for well over three years.

We also approve the third and fourth items of injuries since we are satisfied with the Judge's assessment thereon. The awards of RM15,000 for the compound fracture of the lower third of the left radius and ulna and RM500 for the minor bruises of both knees and right chin were made after comparison with the relevant authorities as guidance. In our view they are just and reasonable and we have no grounds to interfere.

The next item refers to the neck injuries, the most serious of which as the learned Judge put it being "the fracture of the voice box which has permanently impaired the plaintiff as he cannot speak normally now."

In considering the award under this head the learned Judge did not place any reliance on the authorities cited for comparison on the ground that the injuries were quite unlike the injuries suffered by the respondent. She applied her experience in adjudicating cases of this nature and awarded a global sum of RM40,000 as damages. With respect we do not consider it proper for the learned Judge to discard the authorities and use her own experience in assessing the damages. Experience alone however long without resorting to comparable cases which are the best guides, may result in speculation.

The nearest case is *Subramaniam s/o Appavoo v. Beranang Syndicate Berhad* (*Quantum of Accident Cases by Dass, Vol. 2 p. 432*) in which a 25 year old rubber tapper earning about RM200 per month suffered neck injuries as a result of accident while at work and was awarded RM14,000 for pain and suffering and loss of amenities. Medical opinion expressed the finding of partial compression of the nerve trunks of the bronchial plexes on the right side of the neck, partial injury to the nerve trunk involving the muscles and sensory nerves, resulting in pain, touch sensation and weakness of the right hand when attempting of lift heavy weights. There was no evidence of fracture or dislocation of the cerval spine. The respondent's injuries in the present case are more extensive. Apart from the fracture of the voice box, there is nasal intonation resulting from chronic nasal obstruction for which an operation was performed resulting in depression of the nasal bridge with the lower half of the nose pushed to one side and nasal airway is poor on both sides. Both are certified to be permanent.

The learned Judge in awarding RM40,000 in general damages appeared to have taken into consideration the impairment of the respondent's voice as affecting his chances of getting employment in the future when pitted against someone who speaks normally. Having earned himself a private pilot licence his ambition was to be a commercial pilot. We are of the view that this factor falls under the item of loss of future earnings and/or loss of earning capacity for which at a later stage the learned Judge held that the respondent was not entitled to either. The two items should be considered separately from pain and suffering and loss of amenities. For pain and suffering the plaintiff is entitled to damages for the pain he has suffered during the time he was out of work and which he will suffer as he goes on through life and for loss of amenities, for the impediment which he will have in doing the ordinary things in life.

The award of RM40,000 is therefore erroneous and manifestly excessive.

Taking into account the neck injuries suffered by the respondent including his loss of amenities, we are of the view that RM22,000 should be a fair and reasonable award. This is made up of RM15,000 for pain and suffering and RM7,000 for the impairment of voice which was rendered hoarse and weak and permanent nasal deformity and obstruction and depression of nasal bridge. We also bear in mind the likelihood of overlapping.

Award

In the result the award for general damages would be a global sum of RM63,500 made up of (i) RM26,000 for facial injuries, (ii) RM22,000 for neck injuries, (iii) RM15,000 for fracture of the lower half of the left radius and ulna and (iv) RM500 for minor bruises on both knees and chin.

Cross Appeal

The main ground is that the learned trial Judge erred in holding that loss of future earnings and loss of earning capacity are items of special damages which the respondent is only entitled to claim provided they are specifically pleaded.

Both items fall under general damages. The best guide is to remember the principle adopted by the Court of Appeal in *Low Ah Tow v. Yusof Kayab* [1954] 20 MLJ 112 which we agree i.e. when assessing general damages three elements have to be considered viz. (i) pain and suffering, (ii) loss of future earnings and (iii) the disadvantage arising from disablement apart from loss of earning power. Element (ii) is related to probable earnings of the injured person while elements (i) and (ii) are not so related.

General and Special Damages Distinguished.

General damages refer to the damage which the law "implies in wrongs actionable *per se"* and is averred in general terms in the pleadings without the necessity of quantifying the amount. They include future loss of earnings as well as damages for pain and suffering and loss of amenities. They relate to items of damage whether pecuniary or non-pecuniary. Special damages on the other hand have to be specifically pleaded and strictly proved. They refer to past expenses and loss of earnings. The exact loss must be pleaded where the precise amount of item has become clear before the trial. Loss of future earnings or post-trial loss differs from pre-trial loss which comes under special damages. The reason that special damages have to be specifically pleaded is in order to comply with its object which is to crystallize the issue and to put the defendants on their guard and tell them what they have to meet when the case comes on trial. (See *Domsalla v. Barr* [1969] WLR 630; *Phillips v. Phillips* [1878] QBD 127, 139 and *Ong Ah Long v. Dr. S. Underwood* [1983] CLJ (Rep) 300

Loss of Future Earnings and Loss of Earning Capacity Distinguished

There is also a difference between loss of future earnings and loss of earning capacity although both items are under general damages. Future loss of earnings or loss of prospective earnings are awarded for real assessable loss i.e. loss that is capable of assessment at the date of the trial. It must be proved by evidence and not by mere speculation. In the absence of such evidence if the Court is satisfied that the plaintiff has suffered a loss of earning capacity, he will be awarded a sum as part of the general damages for his disability suffered as a result of the injuries sustained, instead of compensation for loss of future earnings. It arises where there is a residual risk that the plaintiff might be thrown out of work altogether at some future date. The risk must be real and not speculative or fanciful. Any loss of money is relevant, whether the money is properly described as "earnings" or not, provided that the money is more than a "mere possible contingency." Thus loss of possible contract as opposed to loss of probable contract is not recoverable. (See *Kemp and Kemp on the Quantum of Damages*, 4th Edn. Vol. 1, on pp. 122 and 123). Generally both items need not be specifically pleaded as in the case of special damages but averred in general terms in the pleadings.

In the present case it was sufficient for the respondent to aver "And the plaintiff prays for judgment for: 1. General damages" in his pleadings appearing at p. 11 of the record.

Loss of Future Earnings

The next question is whether the respondent is entitled to recover damages for loss of future earnings or for loss of earning capacity. The trial Judge after going through the evidence answered in the negative. On the principle stated above for loss of future earnings there must be evidence of a real and substantial loss which must not be remote and speculative. The evidence shows that prior to the accident the respondent was employed as an administrative officer by Keang Nam Enterprise Ltd. Kuala Lumpur a private company of civil and mechanical engineers, general contractors, importers and exporters. He was placed on probation for a period of three months with effect from 8 June 1977 and was drawing a monthly salary of RM400 (See p. 42 of the record). Subsequent salary adjustments would be based on performance. However according to his testimony which appeared to be undisputed, on confirmation he would be paid RM450 a month and thereafter increments between RM50 to RM100 for every three months depending on his performance. Between 31 August 1977 and 31 August 1978 he expected to earn a monthly salary of RM550 between 31 August 1978 and 31 August 1980 a monthly salary of RM700 and between 31 August 1980 and 31 August 1982 a monthly salary of RM1,200. Apart from that he would also be paid transport and housing allowance.

He met with the accident about one month after commencing his job. He was still on probation and according to the letter of offer the probation period may be reduced or extended at the discretion of the company. During the probation period termination of employment may be extended by either party giving to the other one day's notice in writing or pay in lieu thereof.

It is clear therefore that after the accident the respondent did not report back for duty and in the absence of any evidence relating to the required notice of extension it could safely be implied that his service with the company had been terminated. Secondly, since he has not been confirmed in the said employment it could not be accepted that he would be entitled to the salary scheme which he expected to receive as a confirmed employee. The more so when that depended on his performance.

It is not disputed that as a result of the accident he suffered permanent hoarseness and weakness of the voice due to laryngeal injury and subsequent scarring and deformity of the laryngeal inlet. (pp. 49(e) and 50(ii) & (iii) of record). But since he had failed to report back for duty it was not known whether the company would have allowed him to continue his job or otherwise. If he had done so and was accepted evidence would be available to indicate whether his injury would likely jeopardise the prospect of confirmation and or promotions in his job. In short he could have carried on working as administrative officer with the company.

The respondent however claimed damages for the loss that he would expect to earn as a commercial pilot. It was his ambition to be one. Earlier on in 1976 he applied for a job of a trainee Aircraft Maintenance Engineer with the Malaysian Airline System (MAS) with a view to becoming a pilot. He appeared for interview but failed to get the job. In 1980 i.e. more than two years after the accident he started taking flying lessons with the Flying Club, obtained a private pilot licence (Exh. P2) and is still continuing his training. He is qualified to fly light aircraft up to 12,000 feet and allowed to carry passengers. However as a result of the hoarseness of his voice his chance of obtaining a commercial pilot licence is slim according to the opinion of the Flight Examiner for the Department of Aviation (PW5) who tested the respondent for a private pilot licence. Any way the respondent has not applied for such licence yet. Apart from the required basic academic qualification or in his case sufficient flying hours with a private pilot licence, he still has to sit for an examination, test and medical

checkup. It is clear therefore there was lacking in evidence of a real and substantial loss as a result of the hoarseness of his voice in relation to the licence which he intended to apply and for which he set out to prepare himself well after the accident.

This case is distinguishable from *Lim Eng Kay v. Jaafar bin Mohamed Said (supra).* The respondent in that case was a school teacher earning monthly salaries and was given no pay leave to further his studies in a university. As a result of an accident he sustained a brain injury. He had a secure job waiting for him having executed an agreement to serve the government for five years on completion of his studies irrespective of whether he succeeded or not. However because of the injury his services as a teacher were terminated. Based on the evidence this Court accepted the trial Judge's findings as a fair assumption that there was a reasonably good chance of him graduating and earning a bigger salary if he was not involved in the accident. There was a real and substantial loss and in fact a total loss of earning as a teacher since he was unable to give private tuition in his attempt to earn an income. He was unemployed after the accident. In the present case we agree with the learned Judge that the respondent is not entitled to damages for loss of future earnings.

Loss of Earning Capacity

The learned Judge followed the test applied in *Moeliker v. A. Reyrolle & Co. Ltd.* [1977] 1 All ER 9, which states that a claim for loss of earning capacity is only available when the plaintiff was in employment. The word "only" should be corrected and read as "generally" since the statement is erroneous. (See Browne LJ's later view in *Cook v. Consolidated Fisheries Ltd.* [1977] ICR 635 at pp. 636 & 640). It is therefore immaterial whether the plaintiff was in or out of employment at the time of the trial so long as the Court is satisfied there is substantial or real risk that he will some time at the end of his working life lose his job or get a less paid employment because of the effect of the injuries sustained. (See Denning MR in *Cook v. Consolidated Fisheries Ltd. (supra)* p. 639).

In that case there was medical evidence to the effect that the injury sustained by the 25 year old plaintiff who was a deckhand on trawlers in Iceland, would likely suffer from osteoarthritis which might affect his working ability within 10 to 15 years and he would likely get it earlier by doing heavy manual work. His employers were willing to employ him but because of the heavy manual work he decided to train as a lorry or van driver. He was not in employment at the date of the trial. The award of £500 under this item was increased to £1,500.

The respondent in the present case was not employed at the date of the trial having failed to return to his job and complete the probationary period after hospitalisation. Instead he pursued a different course and succeeded in obtaining a private pilot licence. He was allowed to fly light aircraft and carry passengers. In fact he is better qualified than he was at the time of the accident. He has a chance to get employment - to use his own words - as a flying instructor. According to the medical evidence (PW2) the respondent can speak like normal persons although his voice is hoarse. There is no medical evidence that in the future he might completely lose his voice. He is not incapacitated in all the ordinary things in life or ordinary work. On the contrary he has proved that he could take on a more strenuous job of a private pilot. We are of the view that there is no substantial risk that he will not get employment again in the future like other able-bodied men. He is not severely handicapped by the hoarseness of his voice except for the slim chance of obtaining a commercial pilot licence which we have dealt with under loss of future earnings. We agree with the learned Judge that his claim for loss of earning capacity should fail.

The last item is for the pre-trial loss of earnings under special damages pleaded as at RM400 per month for 17 months. We are satisfied with the learned Judge's evaluation of the evidence in the surrounding circumstances and awarding the sum of RM2,700 as damages for a period of six months based on the said earning. The respondent has himself to blame for not making any attempt to seek another employment or to return to his former employment much earlier.

The appeal is allowed with costs. The learned Judge's award for general damages is set aside and substituted by the sum of RM63,500 with interest of 6% per annum from the date of the service of the writ. The award for special damages is confirmed i.e. RM5,810 (RM2,700 + agreed sum of RM3,110) with interest at 3% per annum from the date of the accident till the date of realisation. The respondent is entitled to costs in the Court below.

The cross-appeal is dismissed with no order as to costs. The RM500 deposit is to account for costs.

Also found at [1984] 2 CLJ 163